Mid-South Drywall Co., Inc. *and* United Brotherhood of Carpenters and Joiners of America, Arkansas Regional Council. Cases 26–CA–19287, 26–CA–19296, and 26–RC–8099

June 30, 2003

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On February 2, 2000, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, the Charging Party filed a brief in support of the judge's decision, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

For the reasons stated by the judge, we agree that the interrogation of employees Tony Draper and Clifford Loy by Owner Charles Butler violated Section 8(a)(1) of the Act and was objectionable.

The judge also found, and we agree, that leadman Steve Campbell's statement to employees Draper and Loy, during a lunchtime conversation, violated the Act and constituted objectionable conduct. In that conversation, while expressing his opposition to the Union, Campbell told the employees that if it were his business, he would close it.[3] In concluding that this conduct violated Section 8(a)(1) and interfered with the election, the judge noted that although there was insufficient evidence to find that Campbell was a statutory supervisor, he was the Respondent's agent.[4] The judge found that Campbell had both actual and apparent authority to speak on behalf of the Respondent to employees on work-related matters. The Respondent excepts to the Board's finding, arguing that Campbell had no authority to speak on the Respondent's behalf. The Respondent additionally contends that Campbell's statement merely reflected his personal opinion and not the views of management.

We agree with the judge's finding that Campbell is an agent of the Respondent. It is well established that where an employer places a rank-and-file employee in a position in which employees would reasonably believe that the employee speaks on behalf of management, the employer has vested that employee with apparent authority to act as the employer's agent, and the employee's actions are attributable to the employer. See *Pan-Oston Co.*, 336 NLRB 305, 305–306 (2001). In determining whether statements made by individuals to employees are attributable to the employer, the test is whether, under all the circumstances, the employees "would reasonably believe that the employee in question [alleged agent] was reflecting company policy and speaking and acting for management." *Zimmerman Plumbing & Heating Co.*, 325 NLRB 106 (1997), enfd. in relevant part 188 F.3d 508 (6th Cir. 1999), quoting *Waterbed World*, 286 NLRB 425, 426–427 (1987), enfd. 974 F.2d 1329 (1st Cir. 1992).

It is undisputed that Campbell is often the highest ranking employee on the Respondent's jobsites. Campbell's duties include directing the employees' daily job activities, ordering materials, and telling employees what time to come to and leave work. Charles Butler, one of the Respondent's owners, testified that while Campbell does not have the authority to discharge, layoff, or recall employees, once those decisions have been made by the Respondent's owners, it is leadmen such as Campbell who communicate those decisions to the employees. Butler further testified that Campbell has, in fact, informed employees that they have been laid off or fired and has distributed checks to employees on the owners' behalf. Employee Tony Draper testified that it was his understanding that Campbell was a supervisor and that Campbell informed the employees of their daily tasks and kept track of their hours. Similarly, employee Clifford Loy testified that Campbell was a "field supervisor" who essentially ran the jobsite. According to Loy, Campbell assembled the employees at the beginning of the day, instructed them as to their daily assignments, answered questions on work duties throughout the day, and informed the employees when to finish their work and go home. Given the degree to which Campbell acts as a conduit of information to employees on their day-to-day duties, we agree with the judge that the Respondent placed Campbell "in a position where employees could

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[3] In his decision, the judge did not set forth what Campbell actually said during this conversation. The hearing transcript indicates that Campbell stated to employees Draper and Loy that, "if it was my company, and I was forced an election on, that if it was my company, that yes, I would shut my company down, because that's myself."

[4] There are no exceptions to the judge's finding that the evidence failed to establish that Campbell is a statutory supervisor.

reasonably believe that [Campbell] spoke on behalf of management" and had vested Campbell with actual and apparent authority to act as the Respondent's agent. *Sears Roebuck de Puerto Rico*, 284 NLRB 258 (1987). See also *General Trailer, Inc.*, 330 NLRB 1088, 1095 (2000); *Corrugated Partitions West*, 275 NLRB 894, 900–901 (1985).[5]

We further agree with the judge that Campbell's statement is coercive and constitutes a violation of Section 8(a)(1) of the Act and objectionable conduct. The judge found that Campbell, while expressing his opposition to the Union, told two employees that if he owned the business he would close it. Although Campbell phrased his statement in terms of what he would do if it was his company, given Campbell's role as spokesperson for management and the degree to which employees viewed Campbell as being "in charge" of the job, we find that employees would reasonably view Campbell's statement as authorized by the Respondent or at least reflecting a shared management view.

Contrary to our dissenting colleague, we do not find the fact that the threat was couched in terms of personal opinion to be sufficient to neutralize its coerciveness. See, e.g., *Clinton Electronics Corp.*, 332 NLRB 479 (2000), in which the Board found a job loss threat couched as a personal opinion to violate Section 8(a)(1). Although our dissenting colleague notes that there is no evidence that it was Campbell's function to express his opinion to management concerning an entrepreneurial decision to close a plant, there is no evidence suggesting that the employees would understand that Campbell's role as spokesperson for management was limited and did not encompass that specific subject or other particular subjects. Thus, a reasonable employee would tend to be coerced by Campbell's statement of opinion in violation of Section 8(a)(1).[6]

Campbell's statement also constitutes objectionable conduct. A violation of Section 8(a)(1) found to have occurred during the critical period is, a fortiori, conduct which interferes with the results of the election unless it is so de minimus that it is "virtually impossible" to conclude that the violation could have affected the results of the election. *Enola Super Thrift*, 233 NLRB 409 (1977); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786–1787 (1962). Threats of plant closure naturally tend to have a coercive effect on employees' exercise of their statutorily protected right to decide freely whether to become represented. As the Supreme Court has held, employees are "particularly sensitive" to threats of plant closure, and such threats are among the types of unfair labor practices that "destroy election conditions for a longer period of time than others." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 611 fn. 31 (1969). Furthermore, although the Respondent argues that Campbell's statement was made to a small number of employees, the Board will presume dissemination of serious threats, such as threats of plant closure, absent evidence to the contrary. *Spring Industries*, 332 NLRB 40 (2000). As the Board explained in *General Stencils, Inc.*, 195 NLRB 1109, 1110 (1972), enf. denied 472 F.2d 170 (2d Cir. 1972), threats such as those regarding plant closure, which carry with them severe consequences for all employees, will nearly always be discussed among employees. Thus, in light of the severity and presumed dissemination of the unlawful plant closure threat, as well as the unlawful interrogation of two employees, we cannot find that it is virtually impossible to conclude that the violations could have affected the election results. To the contrary, the misconduct here, taken as a whole, could well have affected the results of the election.[7]

Accordingly, we agree with the judge that the Respondent has violated Section 8(a)(1) and that the election should be set aside and a new election held.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Mid-South Drywall, Little Rock, Arkansas, its officers,

[5] In *Corrugated Partitions*, supra, the Board adopted the judge's finding that a leadman was an agent of his employer and that the leadman's statement that the employer would close the plant down if the union won the election should be attributed to the employer. In finding the leadman to be an agent, the judge relied on the facts that he was the highest ranking employee at the plant for several hours a day, and that he assigned and checked employees' work, and informed employees of such management decisions as layoffs and the starting/ending times of their shifts.

[6] See *Avondale Industries*, 329 NLRB 1064, 1093 (1999). In *Avondale*, the Board adopted the judge's conclusion that the respondent violated Sec. 9(a)(1) by a low-level supervisor's threat of plant closure. The judge rejected arguments that the supervisor lacked the authority to effect such a closure himself, reasoning that "[u]nlike an interrogation, which is coercive only if a reasonable employee would perceive it as such, a threat of plant closure is per se a violation of Section 8(a)(1) [citation omitted]. The rationale behind this difference in treatment is that any threat of plant closure 'reasonably tend[s] to coerce employees in the exercise of their rights.'" Id. quoting *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1317 (7th Cir. 1989).

[7] Our dissenting colleague, who disagrees that Campbell's statement constitutes a threat of plant closure violating Sec. 8(a)(1), finds that Butler's interrogation would not, by itself, or in conjunction with Campbell's statement, affect the outcome of the election. Because we find that Campbell's statement also violates the Act and is objectionable, we need not address whether Butler's questioning of the two employees would alone be sufficient to affect the results of the election.

agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the attached notice for that of the administrative law judge.

[Direction of Second Election omitted from publication.]

CHAIRMAN BATTISTA, dissenting.

1. Contrary to my colleagues, I would not find that Campbell's statement was unlawful or objectionable. Campbell said: "If it was my company, and I was forced an election on, that if it was my company, that yes, I would shut my company down, because that's myself." I assume arguendo that Campbell was an agent for the purposes of communicating management directives to employees. However, I disagree with the majority's contention that employees would reasonably consider his comments herein to reflect the views of management. Thus, I would not find that his statement was unlawful or objectionable.

While I acknowledge that employees are sensitive to threats of plant closure, "context is a crucial factor in determining whether a statement is an implied threat." *National By-Products, Inc. v. NLRB*, 931 F.2d 445, 452 (7th Cir. 1991). Taken in such context, it is clear that Campbell's statement did not reflect management's view of possible closure, but rather articulated what Campbell himself would do if he owned Mid-South Drywall. Campbell made his statement during a casual lunchtime discussion about the Union, with two employees with whom he was familiar. The statement was, "If it was my company, . . . I would shut my company down" if the Union prevailed. On its face, the statement makes it clear that Campbell was expressing only his own views, and was not making a prediction or expressing management's view on the matter. Further, there is no evidence that any of the Respondent's representatives or supervisors made similar threats during the Union's campaign. Finally, there is no evidence that Campbell himself habitually communicated management's business plans to employees. Rather, even assuming that Campbell was an agent of the Respondent, he merely served as a conduit of information between management and employees on issues immediately affecting the employees' day-to-day job tasks. Therefore, given Campbell's relationship to employees, the casual atmosphere in which the statement was made, and the fact that the statement itself unambiguously reflected only Campbell's own opinion as to a hypothetical situation, I do not agree that this statement would reasonably tend to threaten or coerce the employees who heard it. Rather, the statement is clearly a "casual comment made within the free flow of conversation between workers." *NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263, 1266 (7th Cir. 1987). As such, I would dismiss this complaint allegation and related objection. See *Gem Urethane Corp.*, 284 NLRB 1349, 1361 (1987).[1]

My colleagues rely on *Avondale Industries*, 329 NLRB 1064, 1093 (1999). The reliance is misplaced. In that case, the supervisor did not make it clear that he spoke only for himself. My colleagues also rely on *Clinton Electronics Corp.*, 332 NLRB 479 (2000). While I have grave doubts about the validity of that opinion (see dissent), I will assume arguendo that it is correct. It is, however, clearly distinguishable. The speaker there voiced the opinion that employees would lose their jobs if the union were selected. Because the speaker was a supervisor, the Board attributed that "opinion" to the employer. By contrast, in the instant case, Campbell (assumed arguendo to be a nonsupervisory agent) stated a hypothetical that was obviously not fact. He said, "If it was my company, . . . I would shut my company down." Clearly, no employee could reasonably infer, from this statement, that the Company (not under Campbell's ownership) would shut down.

My colleagues repeatedly refer to the absence of evidence as to certain matters. For example, they say that there is "no evidence" that employees would understand the limited nature of Campbell's role. Of course, the burden of proof is on the General Counsel and the objecting party. Thus, it is not clear to me how the *absence* of evidence establishes their case. In any event, Campbell's role, as perceived by employees, is what they saw Campbell doing. As noted above, they saw him as one who communicates management directives to employees. Campbell's statement (about what he would do if he were the owner) was not such a directive.

2. I agree with my colleagues that Butler's questioning of employees Draper and Loy about what they thought about the Union and whether the Union had contacted them violated Section 8(a)(1) of the Act. However, my colleagues do not contend that the questioning, by itself, would warrant the setting aside of the election. I agree. Further, since I do not find Campbell's statement to be

[1] See also *NLRB. v. Champion Laboratories, Inc.*, 88 F.2d 223, 229 (7th Cir. 1996). In this case, the Seventh Circuit found that a supervisor's statement to an employee that "I hope you guys are ready to pack up and move to Mexico" was not a violation of the Act because it was made during the course of a casual conversation and there was no evidence that the supervisor's purpose was to confront the employee.

Because I find that Campbell's statement reflected his own opinion and not that of management, I do not pass on *Springs Industries*, 332 NLRB 40 (2000), cited by the majority for the proposition that the Board will presume dissemination of threats of plant closure. For similar reasons, I do not pass on the "virtually impossible" standard of *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786–1787 (1962).

lawful or objectionable, I do not believe that the questioning, in conjunction with the statement, would warrant setting aside the election.

APPENDIX B

NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT question our employees about their union sympathies or activities.

WE WILL NOT threaten employees with job loss or closure of our business if they choose a union to represent them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

MID-SOUTH DRYWALL CO., INC.

Bruce E. Buchanan, Esq., for the General Counsel.
Gregg A. Knutson, Esq., of Little Rock, Arkansas, for the Respondent.
Nga Ostoja–Starzewski, Esq. (Youngdahl, Sadin & McGowan), of Little Rock, Arkansas, for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on December 13, 1999, in Little Rock, Arkansas. After the parties rested, I heard oral argument, and on December 14, 1999, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The provisions relating to objections, conclusions of law, remedy, recommended Order, and notice are set forth below.

Objections

On July 24, 1999, the Union, United Brotherhood of Carpenters and Joiners of America, Arkansas Regional Council, filed a representation petition in Case 26–RC–8099. Pursuant to a stipulated election agreement approved by the Regional Director for Region 26 of the Board, a secret-ballot election was conducted on August 18, 1999, among employees of the Employer, Mid–South Drywall Co., Inc., in the following unit appropriate for collective bargaining:

> All full–time and regular part–time employees, including metal stud framers, drywallers (hangers), apprentices, leadman, and ceiling persons employed by the Employer at its construction sites, EXCLUDING all office clerical employees, professional employees, technical employees, guards and supervisors as defined in the Act.

At the conclusion of the election, the tally of ballots disclosed the following results:

> Approximate number of eligible voters……..31
> Number of void ballots……0
> Number of votes cast for Petitioner……..9
> Number of votes cast against participating labor organization…..……..16
> Number of valid votes counted……...25
> Number of challenged ballots……...2
> Number of valid votes plus challenged ballots…...27
> Challenges are not sufficient in number to affect the results of the election
> A majority of valid votes counted plus challenged ballots has not been cast……..……..for Petitioner

On August 24, 1999, Petitioner filed 10 timely objections to conduct affecting the results of the election, and on November 9, 1999, requested to withdraw certain of these objections, specifically, Objections 5, 6, 7, 8, 9, and 10.

On November 10, 1999, the Regional Director for Region 26 of the Board issued a report on objections recommending that Petitioner's request to withdraw Objections 5, 6, 7, 8, 9, and 10 be approved and that Objections 1, 2, 3, and 4 be resolved in a hearing. On November 18, 1999, the Regional Director issued an order consolidating cases and notice of hearing, which consolidated Case 26–RC–8099 with Cases 26–CA–19287 and 26–CA–19296. As stated above, I heard this consolidated matter on December 13, 1999, in Little Rock, Arkansas.

In agreement with the recommendation of the Regional Director in his report on objections, I recommend that the Board approve the Union's request to withdraw Objections 5, 6, 7, 8, 9, and 10. The Union's remaining objections allege the following:

> 1. The Employer, by its officers, agents and representatives, interfered with, restrained, and/or coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act.

[1] The bench decision appears in uncorrected form at pp. 158 through 171 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as "Appendix A" to this certification.

2. The Employer, by its officers, agents, and representatives, threatened eligible voters with job loss if they supported and/or voted for the Union.

3. The Employer, by its officers, agents, and representatives, unlawfully polled eligible voters regarding their support for the Union during the pre-election period.

4. The Employer, by its officers, agents and representatives, unlawfully interrogated eligible voters regarding their support for the Union during the pre-election period.

To prove these objections, the Union relied on the same evidence presented to establish the unfair labor practice allegations. The Union did not present any additional evidence to support its objections, which therefore may be considered "co-extensive" with the alleged unfair labor practices.

Objection 1 alleges, in effect, that the Employer violated Section 8(a)(1) of the Act. For the reasons stated in appendix A, I have found that the Employer engaged in certain conduct, which violated Section 8(a)(1). This violative conduct also forms the basis for Objections 2 and 4. I recommend that Objection 1 be sustained.

Objection 2, alleging that the Employer threatened voters with job loss, depends on the same evidence presented to support the unfair labor practice allegations in complaint paragraphs 7 and 9. For the reasons stated in Appendix A, I am recommending that the Board dismiss the allegations in complaint paragraph 7, but that it find the violation alleged in complaint paragraph 9.

Specifically, I have found that in August 1999, an agent of the Employer, Steve Campbell, threatened employees with closure of the business if the employees chose the Union to represent them, in violation of Section 8(a)(1) of the Act. The record does not establish the exact date of Campbell's violative statement, but in context, it is clear that he made this threat before the election.

I find that such a threat constitutes objectionable conduct, and recommend that Objection 2 be sustained.

Objection 3 alleges that the Employer unlawfully polled eligible voters regarding their support for the Union. Apart from the instance of interrogation alleged in complaint paragraph 8, which is the subject of Objection 4, the record does not contain evidence that eligible voters were "polled" by the Employer. Therefore, I recommend that Objection 3 be overruled.

Objection 4 depends upon the same evidence presented in support of complaint paragraph 8. As stated in Appendix A, I find that in late July 1999 one of Respondent's owners, Charles Butlers, interrogated two employees regarding their union sympathies and activities, in violation of Section 8(a)(1) of the Act. This action also constitutes objectionable conduct, and I recommend that Objection 2 be sustained.

Having recommended that Objections 1, 2, and 4 be sustained, I further recommend that the Board set aside the election conducted on August 18, 1999, and direct that a new election be conducted.

CONCLUSIONS OF LAW

1. The Respondent, Mid–South Drywall Co., Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, United Brotherhood of Carpenters and Joiners of America, Arkansas Regional Council, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union sympathies and activities, and by threatening employees with closure of its business and job loss if they chose a union to represent them.

4. Respondent engaged in conduct which affected and interfered with the outcome of the election held on August 18, 1999, requiring that the election be set aside.

5. Respondent did not violate the Act in other ways alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as "Appendix B."

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

ORDER

The Respondent, Mid–South Drywall Co., Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union sympathies and activities.

(b) Threatening employees with closure of the business or job loss should they choose a union to represent them.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facilities in Little Rock, Arkansas, copies of the attached notice marked "Appendix B."[3] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 31, 1999.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX A

This is a bench decision in the case of Mid–South Drywall Company, Incorporated, which I will call the "Respondent," and United Brotherhood of Carpenters and Joiners of America, Arkansas Regional Counsel, which I will call the "Charging Party" or the "Union." The case numbers are 26–CA–19287, 26–CA–19296, and 26–RC–8099, the latter being the representation case consolidated with the unfair labor practice cases for hearing. This decision is issued pursuant to Section 102.35, subparagraph 10, and Section 102.45 of the Board's rules and regulations.

I heard the case in Little Rock, Arkansas on Monday, December 13, 1999. At the close of presentation of evidence, counsel were given the opportunity to present oral argument. Additionally, counsel for the Respondent and General Counsel have submitted memoranda in support of their positions. I then recessed the hearing until 10:00 o'clock this morning, December 14, 1999, for preparation of this bench decision.

Because of the Respondent's admissions in its Answer, including the Respondent stipulation at hearing regarding commerce yesterday in reply to the Amendment to the Complaint which the General Counsel had issued, and on the basis of other uncontradicted evidence in the record, I make the following findings of fact:

The original charge in Case 26–CA–19287 was filed by the Union on August 6th, 1999, and a copy was served by first class mail on Respondent on August 6th, 1999. The original charge in 26–CA–19296 was filed by the Union on August 12, 1999, and a copy was served by first class mail on Respondent on August 12th, 1999.

At all times material herein, Respondent, a corporation with an office and place of business in Little Rock, Arkansas, which I will call the Respondent's facility, has been engaged in as a drywall contractor.

During the 12–month period ending October 31, 1999, Respondent in conducting its business operations which I have just described and which are described in paragraph 2 of the Complaint, purchased and received at its facility goods valued in excess of $50,000 from companies in the State of Arkansas, which, in turn, purchased those goods directly from outside the State of Arkansas.

During the 12–month period ending October 31, 1999, Respondent, in conducting its business operations which I have described and which are described in paragraph 2 of the Complaint, performed services in excess of $50,000 for companies in the State of Arkansas, which directly made sales in excess of $50,000 to customers located outside the State of Arkansas.

At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

At all material times, the Union has been a labor organization within the meaning of Section 25 of the Act.

Complaint paragraph 6 contains allegations which are admitted in part, and one which is denied. Complaint paragraph 6 alleges that two of Respondent's owners, Darrell Ray Rodgers and Charles Butler are supervisors within the meaning of Section 2(11) of the Act, and Respondent's agents within the meaning of Section 2(13) of the Act. Respondent has admitted these allegations, and I so find.

Paragraph 6 of the complaint also alleges that Steve Campbell, whom it identifies by the title "supervisor," also is Respondent's supervisor and agent within the meaning of Sections 2(11) and 2(13) of the Act, respectively. Respondent has denied this allegation. It asserts that Campbell is classified as a leadman and is neither a supervisor nor its agent.

Respondent has about 50 construction employees and five leadmen. It is not clear from the record whether Respondent counts the leadmen as included in the total of 50, or whether these five are in addition to 50. The leadmen report directly to one of the owners of Respondent. There is no level of supervision between the owners and the leadmen.

The Act defines supervisors meaning, "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." See 29 U.S.C. § 152(11). Respondent's principles denied that Campbell possessed any of the powers listed in Section 2(11). Campbell also denied having any such authority.

On the other hand, employee Ron Christensen testified that Campbell hired two employees, one in 1997 and one in 1999. However this testimony was conclusory, and without the details needed to determine whether Campbell had exercised independent judgment in hiring these workers or merely carried out a decision made by Respondent's owners.

One of Respondent's owners, Charles Butler described the leadman position as follows: "A leadman is my representative on the job who does things, like accepts materials. He works with the superintendent of the general contractor, to work in the direction that the general contractor wants us to work, and basically lays out the work for the men on the job, as Mid–South employees . . . He also participates in the actual work."

Now, Campbell testified, he described his job title as leadman and his duties as including checking equipment, reading blueprints, providing "leadership for the men" along with "working with my tools" hanging sheetrock at the jobsites. Campbell expressly denied having authority to hire, discharge or engage in the other supervisory actions described in Section 2(11).

Campbell also suggested that if problems arose on the jobsite, he would go to the general contractor's jobsite superintendent, and that this person, not employed by Respondent, would

resolve the problem. In other words, if the situation called for the exercise of independent judgment, the person exercising that judgment would not be an employee of the Respondent at all.

During cross–examination by the General Counsel, Campbell acknowledged that if one of the Respondent's employees at their jobsite had a problem, Campbell would leave his own work and help the employee. The cross–examination continued with this question and answer:

> Q. And you do that because you want to be a leader, right? You want to be a leader?
>
> A. Well, I'm in charge of that job, and when they do arise with a problem, I go see what the problem is, and then go to the superintendent on the jobsite.
>
> Q. And the guys know that you're in charge of that job, right?
>
> A. Yes, sir.

I find that Campbell's testimony contains a telling inconsistency. On the one hand, Campbell denied have any of the powers of a statutory supervisor. On the other hand, he testified, "I'm in charge of that job."

That statement acquires even more importance considering that management visited the jobsite rather infrequently, perhaps as little as once a week to deliver the paychecks. Certainly, real life does not always follow a business school model, in which a person's authority to perform a task is coextensive with his responsibility to get it accomplished. However, the discordance in Campbell's testimony, that is the discrepancy between having no supervisory authority and yet being in charge of the work group, is great enough to raise doubts about Campbell's reliability as a witness.

On this issue, the General Counsel bears the burden of proving that Campbell is a supervisor. Considering the inherent unbelievability of this part of Campbell's testimony, together with the conclusory testimony of Christensen, that Campbell did hire two employees, I find that the evidence is insufficient to meet that burden of proof. There simply is not enough credible evidence to show the extent to which Campbell exercised independent judgment. Therefore, I do not find that Campbell was a supervisor within the meaning of Section 211 of the Act.

However, I do find that the evidence establishes that Campbell was Respondent's agent within the meaning of Section 213 of the Act. As Campbell admitted on cross–examination, the men on his crew regarded him as in charge of the job, and as Owner Butler's testimony establishes, Campbell was Respondent's representative at the jobsite in dealing with the subcontractor's representative. Campbell certainly had both actual and apparent authority to speak for Respondent regarding work–related matters. Therefore, in accordance with paragraph 6 of the Complaint, I find that Campbell is an agent of the Respondent, although I do not find that he is Respondent's supervisor.

Complaint paragraph 7 alleges as follows: "In April 1999, the exact date being presently unknown, the Respondent acting through Darrell Rodgers at Respondent's facility, threatened employees with closure of the business, if the employees chose the Union to represent them for purposes of collective bargaining."

Employee Ron Christensen testified that some time in April 1999, he had a conversation with one of the Respondent's owners, Darrell Ray Rodgers. According to Christensen, no one else participated in this conversation, which took place while Christensen and Rodgers were standing on a walk in front of Respondent's building.

Christensen testified that he, not Rodgers, brought up the subject of the Union's organizing campaign. Christensen said that he had heard that the Union was seeking an election at Mid–South Drywall and asked Rodgers about it. In Christensen's words, "Mr. Rodgers told me if that was to happen, that he would close the doors of Mid–South Drywall down."

Christensen further testified that after Rodgers made the statement, he did not discuss the Union further with Rodgers, but instead got the materials he needed for the task was doing, and went back to work.

Rodgers vehemently denied making the statement which Christensen attributed to him, calling it a "shear fabrication." Rodgers further stated that he was not aware of any Union representative visiting the Respondent's facilities until June 1999, which would be two months after the conversation described by Christensen.

For a number of reasons, I credit Rodgers. First, his demeanor suggested that he was a believable witness. Second, the content of his testimony was consistent with an intent to report events truthfully. For example, Rodgers did not deny being opposed to the Union's organizing effort and expressing his opinion about it. Third, his statement that he was unaware of any Union representatives visiting the Respondent until June, is generally consistent with the testimony of Union official Robert Millar, that he met with Rodgers on July 16, 1999, the day before the Union filed its representation petition.

Fourth, there is no evidence which would contradict Rodgers' statement that he was unaware of the Union's organizing effort in April 1999. Although Union Organizer Millar testified that the Union begin contacting Respondent's employees in December 1998, and that he knew the Union's efforts had attained the status of an organizing campaign by March 1999, the record does not suggest that Rodgers knew this fact. A union typically, although not always, begins an organizing campaign without tipping off the employer of that fact.

Fifth, it is somewhat unlikely that an employee, such as Christensen, would ask the owner of a company about the status of a union organizing campaign. Unless Christensen's curiosity overwhelmed caution, it would seem much more likely for Christensen to have asked another employee about the Union drive, or even called the Union itself, rather than raise the subject with the boss.

Finally, I note that Respondent later discharged Christensen. The record does not reflect the reasons for this termination of employment, but the Complaint does not allege that the discharge violated the Act. The discharge of Christensen may have affected his motivation as a witness.

For all of these reasons, I credit the testimony of Rodgers, rather than Christensen, and find that Rodgers did not make the

statement alleged in Complaint Paragraph 7. Therefore, I recommend that this allegation be dismissed.

Complaint Paragraph 8 alleges that "in late July 1999, the exact date being presently unknown, Respondent, acting through Charles Butler, at Respondent's facility, interrogated employees regarding their union sympathies and activities."

Two of Respondent's employees, Tony Draper and Clifford Loy, testified concerning a conversation they had with Charles Butler at Respondent's shop. On this occasion, they approached Butler to learn whether he could give them their paychecks a day early.

Butler gave each of them an envelope containing a paycheck and some printed material concerning the Respondent's position about the Union's organizing campaign. This written material is in evidence as General Counsel's Exhibit 2. The Government has not alleged that this written material violated the Act.

According to Draper, Butler asked the two men to read the written material enclosed with their paychecks, stating that it set forth Rodgers' position concerning the Union. Draper testified he read this document, and that Butler then asked him what he thought about it. Draper responded with words to the effect that he believed all workers should have retirement and medical benefits.

Draper further testified that Butler asked them if the Union had contacted them, and they described a visit of Union organizers to one of Respondent's jobsites. Draper said that he had not identified himself as a Union supporter at the time of this conversation. Loy's testimony corroborates Draper's.

Butler admitted giving Draper and Loy the envelopes containing their paychecks and the printed material concerning the Union. Butler testified that he told Draper and Loy that he would appreciate their support, but said he did not say anything else about the Union to them. According to Butler, Draper and Loy left immediately without responding to Butler's comment.

Based upon my observations of the witnesses, as well as the fact that Loy's testimony corroborates Draper's, I credit Draper and Loy rather than Butler. Applying the framework used by the administrative law judge and adopted by the Board in Smith and Johnson Construction Company, 324 NLRB No. 153 [973] (October 31, 1997), I find that Butler's statement interfered with, restrained and coerced employees in the exercise of rights protected by Section 7 of the Act. That analytical framework evaluates the allegedly violative statement under five criteria:

First, the background, that is, is there a history of employer hostility and discrimination?

Second, the nature of the information sought, for example, did the interrogator appear to be seeking information on which to base taking action against the individual employees?

Third, the identity of the questioner, that is, how high was he in the company hierarchy?

Fourth, the place and method of interrogation; for example, was an employee called from work to the boss's office? Was there an atmosphere of unnatural informality?

Fifth, the truthfulness of the reply.

The record does not establish that the Respondent had a history of hostility towards the Union or of discrimination against Union adherents. Additionally, the interrogation did not take place in a locus of management authority, such as the owner's office. Presumably, Draper and Loy replied truthfully to Butler's question.

However, I find these considerations are outweighed by Butler's position, not merely as a manager, but as one of the owners of Respondent. Additionally, the information sought, even if not focused on identifying employees who aligned themselves with the Union, still would be of use to the Respondent in countering the Union's organizing efforts, which were then underway.

In these circumstances, I conclude that Butler's statements violate Section 8(a)(1) of the Act. I also find that they constituted objectionable conduct, which took place within the critical period before the election.

Complaint paragraph 9 alleges that "In August 1999, on two occasions, the exact dates being presently unknown, Respondent, acting through Steve Campbell, at Respondent's facility, threatened employees with a closure of the business and/or the subcontracting of the work, if the employees chose the Union to represent them for purposes of collective bargaining."

Campbell did not admit telling any employees that the Respondent would close its business or subcontract the employee's work should the employees choose the Union to represent them. However, Campbell did testify that he had a lunchtime conversation with employees Draper and Loy, in which he expressed the opinion that if it were his business, he would close it. Campbell offered this opinion while expressing his opposition to the Union.

I credit Campbell's testimony and find that he did express his opinion in terms of what he would do if he owned, rather than worked for Mid–South Drywall. In part, my decision to credit Campbell arises from the impression Draper gave when he testified about Campbell's statement. Draper expressed some uncertainty about his recollection.

However, even crediting Campbell's version, I find that the statement interfered, restrained, coerced employees in the exercise of Section 7. For the reasons already stated, I have found that Campbell was an agent of the Respondent. Further, I find that employees regarded Campbell as expressing management's views.

The fact that Campbell expressed the statement that he would close in this subjunctive—as hypothetical action he would take if, contrary to the facts, he owned the company—does not eliminate its coercive effect. In view of Campbell's identification with management, employees would reasonably consider his expression of this strong opinion as a reflection of higher management's attitude.

I find this Campbell's statement violated Section 8(a)(1) of the Act, and constitutes objectionable conduct.

When the transcript of this proceeding has been prepared and served on the parties, I will issue a Certification of Bench Decision, which will have attached to it, as an appendix, the portions of the transcript which record the bench decision that I have just given. I will have corrected any errors in the transcript for typographical purposes and for clarity, and will attach this transcript portion to the Certification, which will then be served on the parties.

The service of the Certification of Bench Decision on the parties, constitutes the event at which the time period for taking an appeal begins to run. The Certification of Bench Decision also will include, in addition to the matters that I have just stated on the record, provisions addressing the Order, Remedy and Notice which I will recommend to the Board, and with respect to the objections to conduct of election which I have found in this case. I appreciate the courtesy and the civility and the professionalism of Counsel in trying this case, and how expeditiously it has proceeded. And thank you very much for that. The hearing is closed.